

IP 03-0016-C H/L Davidson v Cotton  
Judge David F. Hamilton

Signed on 03/30/06

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

JOHNIE E. DAVIDSON,	)	
	)	
Petitioner,	)	
vs.	)	NO. 1:03-cv-00016-DFH-WTL
	)	
ZETTIE COTTON,	)	
	)	
Respondent.	)	

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA**

JOHNIE E. DAVIDSON,	)	
	)	
Petitioner,	)	
v.	)	1:03-cv-0016-DFH-WTL
	)	
ZETTIE COTTON,	)	
	)	
Respondent.	)	

**Entry Discussing Petition for Writ of Habeas Corpus**

A federal court may issue a writ of habeas corpus pursuant to 28 U.S.C. § 2254(a) only if it finds the applicant “is in custody in violation of the Constitution or laws or treaties of the United States.” *Id.* In this case, petitioner Johnie Davidson has failed to make such a showing. Accordingly, his petition for a writ of habeas corpus must be **denied**. This conclusion rests on the following facts and circumstances:

1. Davidson was charged in Floyd County in 1989 with an array of offenses arising from four separate robberies. As summarized by the Indiana Supreme Court when it affirmed the denial of post-conviction relief, Davidson was charged with the following:

(1) On December 4, 1988, Davidson entered Ace Food Mart in New Albany, Indiana and demanded money from cashier Hope Stephens. After Stephens gave Davidson approximately \$350-400, Davidson fled. Davidson was charged with robbery.

(2) On December 22, 1988, Davidson entered Swifty Food Mart in New Albany, placed a pistol on the counter, and demanded money from cashier Sandra Casey. Casey gave him money and Davidson left the store. Davidson was charged with robbery.

(3) On January 1, 1989, at approximately 3:00 a.m., Davidson approached Dr. George Raque in the parking lot of a hospital in Louisville, Kentucky. Davidson ordered Raque at gunpoint to get in his car and drive. After the car crossed over the Ohio River into Indiana, Davidson demanded money, but Raque had only \$10 or \$12. Davidson then ordered Raque out of the car in a dead-end alley in New Albany. Raque tried to escape, Davidson hit him in the head with his gun, and the two returned to the car. As Davidson was entering, Raque drove off. Davidson was charged with attempted robbery, criminal confinement, and battery.

(4) On January 1, 1989, at about 4:00 or 5:00 a.m., Edwin McClure had just left Moore's Supermarket in New Albany and was placing his groceries on the seat of his vehicle when Davidson approached him with a gun in his hand and ordered him to get in the car. McClure fled as Davidson was getting into the car. Davidson was charged with attempted robbery.

*Davidson v. State*, 763 N.E.2d 441, 442-43 (Ind. 2002). The Indiana Supreme Court then described the results of the trial as follows:

In March 1989, [Davidson] was tried on all these charges in a single proceeding. [Davidson] attorney attempted to show that the victims gave substantially different descriptions of the perpetrator and that the police rushed to judgment in order to solve this string of robberies. One victim reported the perpetrator was 5'4" to 5'6" with "dark black" skin, while another victim described the perpetrator as 5'9" to 5'10" with "medium black" skin. One victim told the police the perpetrator had the gun in his left hand while another victim described the perpetrator as right-handed. Dr. Raque reported the perpetrator had some facial hair, like a goatee or a "little mustache [that] go[es] around the mouth," a dark colored jacket, and a hat. On the other hand, McClure, who was allegedly approached by the perpetrator within hours of Raque, described the perpetrator as having no facial hair, a light blue dress jacket or suit coat, and no hat.

[Davidson] was found guilty of all counts except the robbery at Ace Food Mart. He was sentenced to the maximum sentence on each count with all time to be served consecutively--a collective sentence of 81 years.

*Id.* at 443. The Indiana Court of Appeals affirmed the convictions on direct appeal. *Davidson v. State*, 557 N.E.2d 8 (Ind. App. 1990).

2. In his state court post-conviction proceedings and in this federal habeas corpus action, Davidson focuses on the fact that these charges were resolved in a single trial.

a. In his petition for post-conviction relief, Davidson argued that he had been denied the effective assistance of counsel because his attorney failed to seek

severance of the charges. Under controlling Indiana law applicable at the time of Davidson's trial, he could not have received consecutive sentences if the charges from the different robberies and attempted robberies had been tried in separate trials. See *Davidson v. State*, 763 N.E.2d at 445 (majority opinion); but see *id.* at 449-50 (Sullivan, J., and Shepard, C.J., concurring in result) (stating that consecutive sentences would have been permissible in separate trials). This rather unusual rule has since been modified by a statutory amendment. See Ind. Code § 35-50-1-2(c).

b. The trial court denied Davidson's post-conviction petition. The Indiana Court of Appeals reversed the post-conviction court's decision on this issue. *Davidson v. State*, 735 N.E.2d 325 (Ind.Ct.App. 2000).

c. The Indiana Supreme Court granted the State's petition to transfer and in doing so vacated the decision of the Indiana Court of Appeals and reinstated the trial court's denial of the post-conviction petition. *Davidson v. State*, 763 N.E.2d 441 (Ind. 2002).

3. Review of Davidson's habeas action is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Lambert v. McBride*, 365 F.3d 557, 561 (7th Cir. 2004). Under the AEDPA, if a state court adjudicated a constitutional claim on the merits, a federal court may grant habeas relief only if the state court decision was contrary to, or involved an unreasonable application of, Supreme Court precedent, or if the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the state proceeding. 28 U.S.C. § 2254(d)(1), (2); *Early v. Packer*, 537 U.S. 3, 7-8 (2003); *Lambert*, 365 F.3d at 561.

A state-court decision is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result. A state-court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies this Court's precedents to the facts in an objectively unreasonable manner.

*Brown v. Payton*, 125 S. Ct. 1432, 1438-39 (2005) (internal citations omitted). The Seventh Circuit has explained that the "unreasonable application" prong of § 2254(d)(2) "is a difficult standard to meet," meaning

"something like lying well outside the boundaries of permissible differences of opinion." *Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir. 2002). We have held that under this criterion, habeas relief should not be granted if the state court decision can be said to be one of several equally-plausible outcomes. *Boss v. Pierce*, 263 F.3d 734, 742 (7th Cir. 2001).

*Jackson v. Frank*, 348 F.3d 658, 662 (7th Cir. 2003). "The habeas applicant has the burden

of proof to show that the application of federal law was unreasonable.” *Harding v. Sternes*, 380 F.3d 1034, 1043 (7th Cir. 2004) (citing *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002)). Prior to the enactment of AEDPA in 1996, federal courts on habeas review made independent determinations regarding the constitutionality of state court rulings. After the AEDPA, that is no longer the case:

[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

*Williams v. Taylor*, 529 U.S. 362, 411 (2000).

4. The outcome of this case turns on the Indiana Supreme Court’s analysis of Davidson’s claim of ineffective assistance of counsel.

a. The Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684 (1984). For a petitioner to establish that his "counsel's assistance was so defective as to require reversal" of a conviction or a sentence, he must make two showings: (1) deficient performance that (2) prejudiced his defense. *Id.* at 687.

b. With respect to the prong of deficient performance, the Supreme Court has recently "declined to articulate specific guidelines for appropriate attorney conduct and instead [ ] emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Wiggins v. Smith*, 123 S. Ct. 2527, 2535 (2003) (quoting *Strickland*, 466 U.S. at 688). The reviewing court must determine "whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688. The defendant's burden is considerable, because "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Id.*, 466 U.S. at 689 (citing *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). This presumption is "that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.*

c. Even if the petitioner shows counsel's performance was deficient, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 693. Thus, the prejudice prong of *Strickland* requires a petitioner, even one who can show that counsel's errors were unreasonable, to go further and show the errors "actually had an adverse effect on the defense. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test." *Id.* Rather, a petitioner must demonstrate "there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

d. The foregoing outlines the straightforward features of *Strickland*'s two-prong test. In the context of a case such as Davidson's, however, the AEDPA raises the bar:

The bar for establishing that a state court's application of the *Strickland* standard was "unreasonable" is a high one: we have stated on prior occasion that "'only a clear error in applying *Strickland* would support a writ of habeas corpus,'" *Dixon v. Snyder*, 266 F.3d 693, 700-01 (7th Cir. 2001) (quoting *Holman v. Gilmore*, 126 F.3d 876, 882 (7th Cir. 1997)), because "*Strickland* calls for inquiry into degrees," thereby "add[ing] a layer of respect for a state court's application of the legal standard." *Whitehead v. Cowan*, 263 F.3d 708, 731 (7th Cir. 2001) (emphasis added). Accordingly, this Court is *obligated to affirm the district court's decision to deny the writ, so long as the Wisconsin Court of Appeals "t[ook] the [constitutional standard] seriously and produce[d] an answer within the range of defensible positions."* *Mendiola v. Schomig*, 224 F.3d 589, 591 (7th Cir. 2000) (emphasis added).

*Murrell v. Frank*, 332 F.3d 1102, 1111-1112 (7th Cir. 2003).

e. In evaluating a claim of ineffective assistance of counsel, a court should:

evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

*Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

f. The Indiana Supreme Court recognized and applied the *Strickland* standard. Its decision is entitled to § 2254(d)(1) deference. *Matheney v. Anderson*, 377 F.3d 740 (7th Cir. 2004) (citing *United States ex rel. Bell v. Pierson*, 267 F.3d 544, 557 (7th Cir. 2001) (noting that the AEDPA provides for clear error review of state court *Strickland* adjudications because of the inherent "element of deference to counsel's choices in conducting the litigation" in combination with the "layer of respect" added by 28 U.S.C. § 2254(d)(1))).

g. The Indiana Supreme Court initially noted that the failure to have separate

trials on the various charges resulted in the sentences being imposed consecutively. *Davidson*, 763 N.E.2d at 446. The Indiana Supreme Court was also mindful of the appropriate standards designed to safeguard against the distorting effects of hindsight and to evaluate counsel's performance based on the information and choices available to him at the time. *Id.* 446. The Indiana Supreme Court then noted that at trial the defense attempted to show that the four different victims gave inconsistent descriptions of the perpetrator. The defense argued that the police rushed to judgment in order to solve the string of robberies. *Id.* at 447. The court then reviewed counsel's testimony from the post-conviction record and noted that counsel had stated he was sure he would have considered a severance but could not recall his ruminations on the subject or the law at the time on consecutive sentences. *Id.* Based on the state of this record, including the fact that Davidson had been acquitted of a fifth charge involving yet another robbery, the Indiana Supreme Court concluded that Davidson had failed to overcome the strong presumption that counsel's conduct fell within the wide range of reasonable and professional assistance and that counsel's action might be considered sound strategy. *Id.*

5. It is fully evident that the Indiana Supreme Court "took the constitutional standard seriously and produced an answer within the range of defensible positions. "Because this court cannot find that the Indiana Supreme Court "unreasonably applie[d] [the *Strickland* standard] to the facts of the case," this court is without authority to grant Davidson's petition for habeas relief. *Murrell v. Frank*, 332 F.3d at 1111 (citing *Bell v. Cone*, 122 S. Ct. 1843, 1850 (2002)). Accordingly, Davidson's petition for a writ of habeas corpus is **denied**. Davidson's request for a ruling and requests for a status report on this case are **granted**, consistent with the foregoing. Judgment consistent with this Entry shall now issue.

So ordered.

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DAVID F. HAMILTON, Judge  
United States District Court

Date: \_\_\_\_\_